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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 949.

RUBEN K. KING, Commissioner of the State Department of Pensions and Security, State of Alabama; LURLEEN BURNS WALLACE, Chairman, State Board of Pensions and Security, State of Alabama; JAMES RECORD, MRS. MARY WAITE, WILLIAM M. CLARKE, TEMPLE COLEY, GRANT WHIDDON, MRS. MARY ELLA REAVIS, Members of the State Board of Pensions and Security, State of Alabama; MRS. CLINTON S. WILKINSON, SR., Director, Dallas County, Department of Pensions and Security, Individually and in Their Official Capacities,

Appellants,

v.

MRS. SYLVESTER SMITH, Individually, and on Behalf of Her Minor Children, IDA ELIZABETH SMITH, ERNESTINE SMITH, WILLIE LOUIS SMITH and WILLIE JAMES SMITH and on Behalf of All Other Mothers of Needy, Dependent Children Similarly Situated,

Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division.

BRIEF FOR APPELLANTS.

MacDONALD GALLION,
Attorney General of Alabama,
MRS. MARY LEE STAPP,
Assistant Attorney General of Alabama.
MRS. CAROL F. MILLER,
Assistant Attorney General of Alabama,
Administrative Building,
64 North Union Street,
Montgomery, Alabama 36104,
Attorneys for Appellants.

ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Appellees.

On Appeal from the United States District Court for the Middle District of Alabama, Northern Division.

BRIEF FOR APPELLANTS.

OPINION BELOW.

The Opinion of the United States District Court for the Middle District of Alabama, Northern Division (A. 41), is reported at 277 F. Supp. 31.

JURISDICTION.

Appellants filed the Notice of Appeal to this Court in the District Court on November 20, 1967. The Order of Justice Hugo L. Black staying the execution and enforce-

ment of the Decree of the District Court was conditioned on the docketing of the appeal within thirty days from November 27, 1967. The case was docketed in this Court on December 26, 1967, and probable jurisdiction was noted on January 22, 1968. Jurisdiction on appeal is conferred by Title 28, United States Code, Section 1253.

REGULATION INVOLVED.

The substitute parent regulation involved, which was promulgated by the Alabama Department of Pensions and Security, Manual for Administration of Public Assistance, Part I, Chapter II, Section VI, is set out in Appendix page 427.

THE QUESTIONS PRESENTED.

(1) Whether Alabama's substitute parent regulation is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment because the regulation allegedly looks primarily to the moral conduct of the mother or unsuitability of the home and not to economic factors; that allegedly it is a punishment against needy children rather than a classification of the situation of the family in which certain children live; and that allegedly it is not rationally related to the State's effort to place the responsibility for taking care of children on persons who bring them into being or to any other valid purpose of the Aid to Dependent Children statutes.

(2) Whether the lower Court's Decree confuses submittals to the Department of Health, Education and Welfare of proposed legislation which related to classification based on the status of children born out of wedlock with the efforts of the Appellants to effectuate a classification based on the situation of the family, thus imputing an incorrect intention to the Alabama agency.

(3) Whether the Court was correct in striking down the entire substitute parent regulation when only part of it applied to Appellees and without giving reasons as to why the other parts offended a Constitutional guarantee.

(4) Whether Appellees should be required to exhaust their administrative remedies prior to bringing action in Court.

(5) Whether the District Court's Decree provided for proper safeguards of confidentiality concerning those persons ordered to be restored to the Aid to Dependent Children rolls.

STATEMENT OF THE CASE.

The Appellants constitute the administrative and policy making officials responsible for the welfare programs in Alabama administering the public assistance titles of the Social Security Act and the County Director of the Department of Pensions and Security of the County in Alabama in which Appellee Smith and her minor children reside. In Alabama the welfare agency is by law designated the Department of Pensions and Security and is the single State agency designated to administer the public assistance titles of the Social Security Act, Title 42, United States Code, Sections 601, *et seq.* Appellee Smith and her four minor children are former recipients of Aid to Dependent Children (hereinafter called ADC), and aid was terminated to them under the substitute parent regulation in question; this is also a class action on behalf of all other persons similarly situated. By Order of the Court below the United States was made *amicus curiae* and party (A. 20).

The three-Judge District Court has held in this case that a regulation, promulgated by the State Board of Pensions and Security, is invalid and unconstitutional and designates the basis for unconstitutionality as denial of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States on its face and as applied in this case (A. 59).

The regulation in question (A. 427), is a regulation restricting welfare payments to certain families where the grantee relative (usually the mother) cohabits with a substitute parent as defined in the regulation. Under the Alabama regulation the substitute parent may or may not be a putative father of one or more of the children in the household, or he may not know whether he is or not. If the grantee relative continues to cohabit with the able-bodied

adult she must look to him or to other sources to help her financially with the children, or she must terminate the relationship in order to receive public assistance from the State. The regulation does permit the mother to choose which situation she wants to be in. The substitute parent regulation in attempting to arrive at a fair sub-classification of persons whose living situation resembles the situation of persons who live together in legally constituted families, that is in wedlock, attempts to further define those groups of persons who have "roving arrangements". The regulation, therefore, includes the person who cohabits with the mother either in or out of the house. The Alabama regulation does not require that the substitute father assume the role of father, which would require a caseworker to determine such things as whether the man showed kindness and affection to the children. Alabama, therefore, has eliminated from its determination of eligibility for public funds the attitude of the man toward the children. The Alabama regulation is based on the relationship of cohabitation with the mother. She cannot continue to get public aid merely by showing that the relationship takes place outside of the home only, or that it takes place inside the home only. The regulation does not authorize "midnight raids" or any searches after office hours into the homes of ADC recipients.

Mr. Ruben K. King, Commissioner of the State Department of Pensions and Security, testified that the Aid to Dependent Children program was very controversial and that there had been talk about abolishing the program. He had a study (A. 98, 569) made of the program. The two results of this study were to seek legislation making nonsupport a felony and promulgating the policy requiring that those enjoying the privileges of a husband exercise responsibilities in the home (A. 67). Mr. King stated that the regulation was not looking at the lack of morality in these relationships but was looking at them as a source of

income. He emphasized that the regulation was based on the economic resources of the family and the relationship of the regulation to the scope of the ADC program in Alabama as administered by the Department of Pensions and Security. The average payment per family per month immediately before the regulation was promulgated was $48.15 per family or $11.69 per recipient. In January 1967, two and one half years later, the payment was $52.68 per family or $12.72 per recipient (A. 70).[1]

In defining terms of the policy the Commissioner explained that the term "cohabitation" was taken from Black's Dictionary (A. 77). In discussing his interpretation of "frequently" he stated that each case would have to be resolved on its own unique factual situation, but that he would not consider cohabitation less than once a week to be "frequent" (A. 84). Commissioner King pointed out that the policy permits the mother, instead of the State, to make a choice about discontinuing this type of relationship but that he expected the policy to be interpreted with reasonableness and if a woman was mentally incapable of securing proper evidence or does not know what is meant by the policy in those situations "it would be my hope that there has not been a determination of ineligibility" (A. 109). He also stated that if the Department found that the mother was not using the money to care for the children and the children were being deprived, the Department would petition the court for temporary custody of the children and would put those children in foster homes.

Mr. King pointed out a great concern over losing the entire program and the fact that the families with children were getting only 38% of what they should be getting. He stated that the regulation was never intended to try to punish a Negro or to try to punish a white person,

[1] In December 1967 the average payment in the ADC category per family was $64.35, or $15.51 per recipient.

but that it was a question in his mind of whether it would be necessary to remove three or four thousand persons from the ADC rolls or whether it would be necessary to discontinue the entire ADC program (A. 106-108). Mr. King stated that in 1966 there was a total of 17,157 families in the State receiving ADC, that 67.3% were members of the Negro race and 32.4% were members of the white race and .03% of other races. Prior to the promulgation of the substitute parent regulation there were in 1964 a total of 22,373 families receiving ADC, 66% were members of the Negro race, 33.7% were members of the white race, and .03% were of other races. (P. L. Exhibit 18, A. 564.) Commissioner King testified that he knew of no administrative appeal having been taken by Plaintiff Smith (A. 113).

In the Board minutes (A. 711) Commissioner King stated that he did not believe the Board should be in the position of subsidizing such relationships. He also told the Board that the new policies were not intended to hurt children but to place the burden of support where it belonged.

The substitute parent regulation has never been approved or disapproved by the Department of Health, Education and Welfare. All policy material submitted to HEW relating to the substitute parent policy has been marked NL—Is under consideration and notice of action will be sent later (A. 364, 367, 373, 377, 380).

The regulations of the Alabama Agency governing the application process (A. 784-792), the processes relating to reviews to determine whether continuing eligibility exists (A. 792-798), and right of fair hearings (A. 854-865), all of which have been approved at the Federal level, were submitted in evidence.

In her testimony Mrs. Jacquelyn Stancil, the Plaintiff's caseworker, indicated the way in which she applied

agency procedure in reviewing Plaintiff's case to determine whether or not there was continuing eligibility. Mrs. Stancil testified that she did examine Mrs. Smith's file at the time Mrs. Smith was assigned to her caseload. According to the caseworker the case record contained information about the Plaintiff's relationship with a man who was living with her on the weekends; prior to the time the substitute parent regulation went into effect, and the source of the information was the Plaintiff herself (A. 129-130). The caseworker further testified that when she made a review, a reference given to her by the Plaintiff to verify points of eligibility had indicated that the Plaintiff was continuing to maintain a marital relationship (A. 131). Subsequently, the caseworker interviewed Mrs. Smith, told her that according to information which she had received that she and a Mr. Williams were maintaining a marital relationship and asked Mrs. Smith if this was correct and Mrs. Smith said that it was (A. 131). Mrs. Stancil stated that the Plaintiff said that Mr. Williams had stayed at her home on the weekend (A. 131). Subsequently, Mrs. Smith in her deposition denied admitting the relationship to Mrs. Stancil (A. 255, 266, 267). In her deposition Plaintiff Smith at one point testified that the substitute parent regulation had not been explained to her (A. 254); however, on cross-examination she stated that the workers had tried to explain it to her (A. 268, 269). Mrs. Stancil testified that she explained to Mrs. Smith the right of appeal (A. 145). Mrs. Smith denied that the right of appeal was explained to her (A. 255, 256, 260, 261). Mrs. Smith admitted that she did receive the mimeographed sheet explaining the right of appeal (A. 272); she further read from a duplicate mimeographed sheet and indicated that she understood what she had read (A. 272-274).

Defendant Wilkinson along with six other County Directors of Departments of Pensions and Security gave

interpretations on the way in which the substitute parent policy was applied in their counties. The testimony of the seven Directors of County Departments of Pensions and Security indicated that the facts of each case have to be considered in determining how the policy reasonably applies, that is, whether the relationship is a continuous one. This bears out the testimony of Mr. King to the effect that the application of the policy would depend upon the facts in each situation (A. 84, 87, 88, 170, 171, 180, 201, 227, 233, 234). Even though Appellees have contended that the terms in the policy such as "frequently" and "regularly" had different meanings to different County Directors, there is the consistent interpretation that these terms must be applied in accordance with the facts of each situation. Numerous statistics were introduced into evidence, including studies relating to average grants and the number of families receiving Aid to Dependent Children classified by race. While statistics for seven counties selected by Appellees showed that in certain counties there were many more cases of Negro families closed than white (A. 736), there was no evidence whatsoever to show that the policy was applied differently to any person because of race. There was no evidence that any white family or any Negro family to which the policy was applicable was still receiving aid or that any family to which the policy was not applicable had had their aid terminated because of the policy. Detailed caseload studies were introduced into evidence relating to Dallas County, the home of Plaintiff Smith. In June of 1964, shortly before the regulation went into effect the evidence showed that 97.9% of the families receiving Aid to Dependent Children were members of the Negro race and that in June 1966, nearly two years after application of the regulation began, 98.4% of the ADC caseload in Dallas County were members of the Negro race. Evidence introduced in the case showed that according to the 1960 census 57.7% of the population in

Dallas County were members of the Negro race and 42.3%, white.

The District Court did not uphold Appellants' contention that the suit was premature since Appellees had not exhausted their administrative remedies.

A Motion to Stay the Mandates was filed in the Court below on November 15, 1967. On November 16, 1967, an Order was entered by that Court denying the Motion for Stay Pending Appeal. On November 27, 1967, an Order (Exhibit A hereto) was entered by Justice Hugo L. Black granting the Appellants' Application for Stay Pending Appeal. The Supreme Court noted probable jurisdiction on January 22, 1968. After the enactment into law of the 1967 Social Security Amendments, which included a limitation on Federal ADC funds based on the number of persons receiving such aid because of absent fathers during the first quarter of 1968, Justice Black entered an Order (Exhibit B hereto) on January 29, 1968, vacating his Stay Order of November 27, 1967. On January 31, 1968, Appellants filed a Motion in the District Court requesting an extension of time to file the list of persons restored to the Alabama Aid to Dependent Children rolls pursuant to the Opinion and Decree of that Court, and further moving the Court to issue an appropriate Order to protect such list from public disclosure and to protect the confidential nature of the list (Exhibit C hereto). On February 1, 1968, the District Court entered an Order (Exhibit D hereto) giving Appellants until February 26, 1968, to file the list. The District Court did not grant the Motion relating to confidentiality.

SUMMARY OF ARGUMENT.

I.

The substitute parent regulation is a reasonable classification under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A State welfare agency necessarily classifies persons in accordance with their need for public aid. Where families with able-bodied parents who are married to each other and who reside together are not aided, families similar except for legality of marital status should properly be included within the same category. If this were not done, families with legal status would be unfairly discriminated against and non-marriage would be encouraged and rewarded.

Such classification is valid when the regulation is based on the relationship between the mother and the man who assumes the role of husband and does not require evidence that the man who assumes the role of husband also assumes the role of parent.

To make responsible use of available funds welfare agencies must restrict categories in order to include the most needy. The regulation is not based on moral judgments relating to the sexual behavior of the poor, nor is it based on the status of illegitimacy of children: it is a method of utilizing economic resources available. The man who has the privileges of a husband should reasonably be expected to assume the responsibilities of the family rather than the State.

Racial discrimination has never been permitted under the Federal-State public welfare system and has not been shown to exist under the substitute parent regulation.

II.

Proposed legislation which was not sponsored by the Alabama agency was transmitted to the Department of Health, Education and Welfare by the Alabama agency. These legislative proposals, which were not passed, appear to have been confused by the lower Court with submittals of policy material to HEW by the Alabama agency. This confusion resulted in an incorrect imputation of intention to the Alabama agency of basing policy on morals of parents and on the legitimacy status of children.

III.

The substitute parent regulation sets out three separate subdivisions in its definition of substitute father. The situation of the Plaintiff in this case falls into the second group defined; for this reason the decision of the lower Court should properly have been confined to a consideration of that part of the regulation. The Court did not give reasons as to why the other parts of the regulation offended any Constitutional guarantee.

The right of privacy asserted by the Plaintiff is a right which applies only to married persons. Plaintiff's claim of privilege against self-incrimination is not ripe for consideration because there is no threat of prosecution. There are no vested rights in public assistance which could be construed as property rights which would be inconsistent with the right of the State to abolish a public assistance category.

IV.

In view of the broad protection now afforded public assistance applicants and recipients under the administrative appeal procedures, these remedies should be exhausted before class action suits are initiated.

V.

One of the rights which is clearly safeguarded by statute for all applicants and recipients of public assistance is the right to confidentiality. This right should not go unprotected in a class action, thereby preventing members of that class from enjoying the rights secured by statute. The lower Court should have given the protective orders requested by the Alabama agency to guard the confidential nature of the list of names submitted by the agency pursuant to the Order of the Court.

ARGUMENT.

I.

Equal Protection—the Alabama Regulation Is a Reasonable Classification.

The Appellants, hereinafter referred to as the Alabama agency, contend that the substitute parent regulation represents a fair classification within the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. There are three major reasons for the development of the regulation: (1) the necessity of the State to limit its ADC program in the light of the financial resources available for ADC; (2) recognition of public interest in not putting more money into a program which results in underwriting a situation which in effect approves of bringing other children into existence in families that cannot afford to care for them; and (3) the public interest in not giving a monetary advantage to people in illicit relationships which can have the effect of deterring marriage.

Woven into debates in the Federal-State efforts to provide for the poor and needy through public welfare agencies is this recurring problem: to help one group may cause financial deprivation of another; to cut off one group may result in benefiting a larger group. The public welfare system in Alabama, like many States, is a categorical method of supplying some financial help and services to some needy people. It exists in accordion-like fashion dependent upon the money which the public chooses to put into the system; when the program contracts it is necessary to reduce payments or to limit the groups assisted. The name of the public welfare agency in Alabama is Pensions and Security, but the change of the name in

1955 did not change the fact that it is *public* welfare. This Court is being asked to determine if Alabama's substitute parent regulation is reasonable in the light of the Equal Protection Clause and the necessity of the State to arrive at a fair method of expending public monies in its limited ADC program.

In Alabama Aid to Dependent Children is not given when children live in the home with two able-bodied parents. By regulation this applies to children living in the home with a parent and a stepfather or stepmother and to children living in the home with a parent and a man or woman without marriage. Thus, the State places those families living together out of wedlock in the same situation as those living together in wedlock. In applying this regulation in Alabama, the ADC caseload was reduced. Payments to families who continue to receive the payments have been increased. The caseload per caseworker has been reduced. More money and more services are available to families with dependent children in Alabama who remain on the rolls. The questions which a public welfare agency must resolve any time a policy is adopted or deleted are: What would be the financial impact on the total program? Is this a fair regulation in the light of those needy persons who are not now receiving aid? In identifying the "thereness" of a substitute parent these two questions have assumed a paramount importance.

Since the Aid to Dependent Children grant, unlike some other public efforts designed to help the indigent, involves a regular payment of public funds to be expended during the period of time the family is in need or until such time as the child reaches eighteen years of age, or twenty-one if attending school, there is every reason why there is a public interest in a State not undertaking the payment of these funds to families who because of their living arrangements would be in the same situation as if the

parents were married, except for the marriage. If public aid is permitted in an informal relationship, but not in a legal one, the bizarre result is the penalizing of a family because of the very legality of its status.

In Alabama the grant known as Aid to Dependent Children will hereinafter be called ADC. On a national level and in other States the same program named Aid to Families with Dependent Children will hereinafter be called AFDC.

In his article on *The War on Poverty,* Vice President Hubert H. Humphrey has written the following:

> "America has continually made attempts to improve the lot of its poor. In the recent past we have had the 'New Deal' and the 'Fair Deal.' In nearly every generation we have had social reform legislation working to mitigate the harshness of poverty. Edgar May states in his book *The Wasted Americans* that prior to the war on poverty the welfare programs of the past were basically outgrowths of two opposing views on poverty:
>
> The first one, 'Go to the ant, thou sluggard, consider her ways and be wise.' (*Proverbs* 6:6)
>
> The second, 'And if thy brother be waxen poor and fallen in decay with thee, then thou shalt relieve him. Yea, though he be a stranger or a sojourner, that he may live with thee.' (*Leviticus* 25:35)
>
> In America it has been the philosophy of the former rather than the latter that most often prevailed."[2]

The Alabama agency does not believe that the "go to the ant theory" has perished but considers that in AFDC it has evolved in the direction of the public requirement that now that this has been considered, it is time for every-

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[2] 31 *Law and Contemporary Problems* 6, 7.

one to be rehabilitated and go to work.[3] It does not appear that any of the major Congressional thrusts directed to solving poverty problems show any letup in sight for persons who really want to remain dependent. The national programs reflect a determination to rehabilitate everybody and even the concept in AFDC in the Social Security Act has shifted away from the mother staying at home with her children to the mother being a part of the labor market.[4] Whereas it might be advanced that the Economic Opportunity projects were designed to help the *nouveau pauvre*,[5] it is clear that public assistance in Alabama is concerned with the very poor, poor. Nevertheless, there are many other efforts, public and private, involved in helping the poor—particularly poor persons with children. The substitute parent regulation in seeking to limit the groups who will receive regular monthly grants has as one of its primary aims the raising of grants to those families who remain on the rolls. Unlike the picture painted by Plaintiffs in the Court below,[6] the Alabama

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[3] *The New Social and Rehabilitation Service*, Mary E. Switzer, p. 17; *Social Welfare Policy for 1976*, by Wilbur J. Cohen, The Journal of the American Public Welfare Association, Vol. XXVI, p. 23 (January 1968).

[4] "A new part C of the AFDC title establishes a 'work incentive program' which will be administered by the Department of Labor to provide training and employment for AFDC recipients, with the ultimate objective of placing as many persons as possible in regular employment." Section 204 of Title II, Public Welfare Amendments 1967, 81 Stat. 884.

[5] There is no single standard for financial eligibility for OEO projects. For non-farm families of four, the guideline is $3,200 per year with $500 added or subtracted for less or more members of the family. For farm families the amounts are less, representing only about 60% of the amount for the non-farm family. In Appalachia (Alabama has 32 counties in this area) there is still another standard which is somewhat lower than OEO in other parts of the State. The means test for ADC payments in Alabama is considerably lower (A. 833-835).

[6] The picture suggested was that if a mother did not receive her ADC grant, the children starved. As it turned out many of

agency would like this Court to realize some of the other efforts and programs which are available to assist families with dependent children in Alabama. Some of them are: (1) Foster boarding homes that care for children who are temporarily out of their own homes, (2) Day Care Center Services for children two and one-half years of age and upward who are in need of group day care, (3) Family Day Care Services for children under two and one-half years of age, (4) Child Caring Agencies and Institutions that give care to neglected and dependent children, (5) Maternity homes and hospitals for unmarried mothers, (6) Salvation Army in many communities helps needy families in various ways—food, clothing, rent, furniture, etc., (7) Juvenile Courts can often be helpful in dealing with various parent-child relationship situations, (8) Private child placing agencies: a. Children's Aid Society of Jefferson County, b. Family Counseling Center of Mobile, c. Methodist Children's Home, d. Bureau of Catholic Charities, and (9) Various programs sponsored by O. E. O. such as: a. Head Start Programs, b. Parent-Child Centers, and c. Manpower Development and Training Programs, and (10) Surplus Commodities and Food Stamp Programs. This is a partial list but it is obvious that there are many groups, institutions, and agencies at work to assist families. It does not appear that regular payment grants to families with dependent children are being favored on a national or state level with respect to the amount of money available for the grant. Further state and national efforts are under way for day care, Head Start programs and work training incentive programs for appropriate members of ADC families. Continuing payments to families found ineligible because of the regulation causes the

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the mothers married. Exhibit E contains a statistical summary of what happened to the families in the caseload affected by the substitute parent policy. This became available only after vacation of the Stay.

likelihood of reducing payments and services to those other recipients receiving aid. The Alabama agency does not see how spreading its limited ADC money any thinner will accomplish responsible results.

The cases cited by the lower Court in connection with the classification question do relate to the question of the rules for determining whether a classification is in accordance with the Equal Protection Clause of the Fourteenth Amendment. These rules are stated in *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2d 1485 (1957). However, none of the cases cited involves a fact situation similar to this case nor do they relate to the specific public interest contemplated by this case. The question is not, as stated in the Opinion of the lower Court, whether a classification can be used which is not rationally related to the purpose sought to be accomplished; the very basis for constitutional classification requires a rational relationship to such purpose. The question, rather, is whether the classification created by the Alabama regulation is related to proper purposes under the ADC statutes. Specifically the lower Court's statement is:

> "What is involved is whether needy children can be deprived of public assistance through the use of a State regulation that creates classifications not rationally related to need and through the use of these classifications deprives approximately 16,000 Alabama children of financial assistance to which they are otherwise entitled" (A. 57).

We submit that this begs the question. A review of all cases cited in the Opinion reveals that there has been no judicial determination of the reasonableness of the kind of classification made in the Alabama substitute parent regulation. Further, none of the cases reaches the question of the power of the State to limit public assistance and whether a rule, like the regulation in question here,

is within the proper scope of that power. An outline of the equal protection issues in the cases cited by the Court below are set out as Exhibit F.

Black's Law Dictionary gives as its first definition of marriage the following: "*Marriage,* as distinguished from the agreement to marry and from the act of becoming married, *is the* civil status, *condition,* or relation *of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.*" *Black's Law Dictionary,* Fourth Edition, West Publishing Company, page 1123. (Emphasis supplied.) The association is founded on the distinction of sex. Somewhere in the enigma of this distinction lies the essence of this lawsuit. When persons of different sexes simulate the marriage relationship and enter into "associations" on a continuous basis without making a lifetime commitment, should such associations be favored in the determination of ADC eligibility? The common law marriage is not included in the substitute parent policy since in Alabama a common law marriage is a marriage and it is not this type of relationship which the substitute parent policy defines. It has been held in Alabama "To constitute a 'common-law marriage' there must be a mutual understanding to presently enter into marriage relation, permanent and exclusive of all others, followed by cohabitation or mutual assumption openly of marital duties and obligations and public recognition of existence of common-law marriage." *Goodman v. McMillan,* 61 So. 2d 55, 258 Ala. 125, certiorari denied 73 S. Ct. 789, 345 U. S. 929, 97 L. Ed. 1359, rehearing denied 73 S. Ct. 942, 345 U. S. 961, 97 L. Ed. 1381, rehearing denied 73 S. Ct. 1141, 345 U. S. 1004, 97 L. Ed. 1408, rehearing denied 74 S. Ct. 73, 346 U. S. 853, 98 L. Ed. 368, petition denied 74 S. Ct. 228, 346 U. S. 892, 98 L. Ed. 395, petition denied 74 S. Ct. 305, 346 U. S. 920, 98 L. Ed. 414.

The substitute parent policy would, however, include those relationships meeting all of the tests of a common-law marriage except that one or both of the parties are not free to contract marriage. The Alabama regulation attempts to include persons who enter into an association founded on a distinction of sex which does not constitute a legal marriage but does include regular cohabitation —a person who assumes the role of spouse, but is not legally the spouse.

The problem involved in assuming that the man in "informal arrangements" can be considered as a substitute parent is similar to the problem raised in step-parent relationships. In a study entitled *The Stepfather in the Family,* published in 1940, Adele Stuart Meriam,[7] after reviewing the legal relationship of a stepfather to children in the family in the various States of the Union writes as follows:

> "These are not all the states but they probably indicate the problems that present themselves. The difference between the attitude of the courts who look at the problem exclusively from a legal point of view and the administrative authorities who view the situation from the point of view of the children's needs is obvious. Not legally but morally, socially, domestically, the stepfathers may seem responsible. When it is a question on the one hand of using public funds or on the other calling on stepfathers to recognize moral or domestic obligations where domestic satisfactions are enjoyed, the choice seems easy to make. Yet the effect on the relationship of the husband and wife resulting from enforcing obligations on the step-parent is not ignored."[8]

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[7] *The Stepfather in the Family,* Adele Stuart Meriam, The University of Chicago, Social Service Monographs, Edited by the Faculty of the School of Social Service Administration.

[8] *Ibid.,* 88.

A helpful comparison showing the California approach has been described as follows:

"In determining a child's eligibility for AFDC benefits, should the earnings of a step-father be taken into account? The California statute, and regulations in a number of other states, make his income relevant. Dr. Bell commented:

> So long as the evidence genuinely supported the conclusion that a man lived continuously in the home or was considered by the family to have the status of 'father' and 'husband,' there may have been little logical basis for distinguishing such a family from those with two able-bodied legally married parents who were excluded until 1961 by Title IV of the Social Security Act, and also until the present time from numerous state and local general assistance programs, particularly in Southern states.

We hold no brief for tying assistance benefits to rigid categories—permitting payment for physical but not for mental or emotional defect, or authorizing benefits when an incapacitated father is in the home but denying them if the father is simply unemployed. Yet it would be impossible to obtain widespread support for an assistance program which ignored the earnings of a natural father. Indeed, only strongly felt notions of parental responsibility can explain the original ADC program's exclusion of a child whose 'able-bodied' natural father is a member of the family. These notions operate today. When the 1961 Social Security Act amendments broadened the program to include families with an unemployed father in the home, 'Congress imposed conditions designed to stimulate the employment or enhance the employment of that parent—that is, to eliminate his idleness and lack of visible means of

support.' And the amendments permitted the states to continue pre-1961 policies. It is perfectly natural that legislators would hesitate to adopt a program which might encourage lazy fathers to rely solely on the public to support their families—their concern is appropriate so long as it does not become an obsession. The Bureau of Public Assistance construed the original ADC provisions to permit exemption of the stepfather's income in determining a child's eligibility—apparently because a stepfather has no statutory obligation to support the child. Yet if the Congress did not want to encourage lazy natural fathers, it should be equally opposed to encouraging lazy stepfathers. The issue, then, is whether stepfathers should be treated differently than are natural fathers when public funds are at stake." 54 Calif. L. J. 774.

In Alabama, aid is not granted where there is a legally married able-bodied stepfather in the home even though the step-father is not the natural father of any of the children in the home. This is one of the reasons why the Alabama agency considers it eminently fair to include other types of comparable arrangements for purposes of limiting its ADC program. The article points out further on pages 776 and 777 as follows:

"More basic considerations also suggest that the stepfather's income should be counted in determining eligibility. One need not be bigoted—against the poor or other minority groups—to believe that welfare programs should encourage stepfathers to assume the support responsibilities which a natural father would be compelled to assume and which, as we have already indicated, many stepfathers voluntarily assume. A 'substitute parent' rule will certainly encourage some stepfathers to support the children in their homes. On the other hand, a stepfather who can

rely upon a monthly AFDC payment may not be as willing to devote his income to maintaining his wife's children. He might also be encouraged not to adopt the children, since his family's government bonus would then terminate. Indeed, there have been cases (in the welfare department records of at least one jurisdiction which did not at the time have a 'substitute parent' rule) in which stepfathers have been urged not to adopt lest AFDC benefits be lost. A 'substitute parent' rule might encourage some stepfathers who obtain employment to divorce their wives; but are the divorce risks more substantial than the irresponsibility we encourage by exempting the stepfather? A 'substitute parent' rule may encourage some stepfathers to stay unemployed; but is avoiding this disincentive more important than treating the stepfather's income as we would the natural father's income?"

We set out in detail the discussion concerning the stepfather since the reasoning is to some extent similar as it respects the substitute parent and man in the house type of consideration. The writers point out that much of the opposition to the substitute parent rule has been occasioned by the use of the rule to regulate the out-of-wedlock sexual behavior of AFDC mothers. Citing the work of Bell, *Aid to Dependent Children,* VII, 1965, Professors Lewis and Levy continue as follows:

"The 'man in the house' rule authorizes the welfare department to consider the income of a 'male person assuming the role of spouse to the mother although not legally married to her' in determining a child's eligibility for AFDC benefits. The rule has produced violent controversy. It seems likely, however, that much of the opposition has been occasioned by use of the rule to regulate the out-of-wedlock sexual behavior of AFDC mothers:

> [T]he 'nonstable, nonlegal' union in Arkansas, the 'male boarder' in Michigan, 'Roger the Lodger' in Oregon, the 'unrelated man living in the home' in Alabama were examples of a rather tenuous relationship where there was no necessary presumption of a consistent or acknowledged relationship and evidence of the man's existence was sometimes so insubstantial or transient that he was dubbed the 'phantom father' in one study."

If a definition includes a man the existence of whom is "so insubstantial or transient" that he may be dubbed "a phantom father" would this make the classification unreasonable in terms of the Fourteenth Amendment? Since, under the Alabama rule the essence of the relationship in all three aspects of the regulation is regular, frequent or continuous cohabitation, and the mother may exercise her right of an administrative appeal to see if the policy has been fairly applied, or discontinue the relationship and receive aid, the Alabama agency contends that this is not a fair label to apply to the Alabama policy. We do consider the reasoning set out further in this article to be most helpful in understanding the position of the Alabama agency with respect to the fairness of its regulation. Thus, on page 778 the writer describing the stable informal relationship which the California regulation attempts to define states the following:

> "The rule recognizes (as does Professor tenBroek) that in a society which includes many cultures and a substantial group of poverty-stricken individuals many perfectly stable informal families will inevitably be found."
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> * * * * * * *
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> "We do not want to be misunderstood. We are not urging a morality crusade. Rather, we see the rule simply as a method of eliminating an evasionary de-

vice. If a stepfather rule is adopted, a 'man in the house' rule is a necessity—so that couples will not be encouraged to live together without marrying in order to continue the mother's AFDC benefits. The more inclusive rule is especially important in jurisdictions in which substantial populations feel little cultural compulsion to engage in ceremonial ('legal') marriage.''

Divorce and remarriage is an expensive luxury that the very poor cannot always afford. We consider the further comments on the man in the house rule pertinent.

''The 'man in the house' rule may accomplish what it was designed to accomplish—financially able 'fathers' will remain in the home and will support the children. We share Professor tenBroek's doubt, however, that in every case 'it is reasonable to infer that a man assuming the role of spouse will contribute to the support of the mother and her needy child.' We also doubt the effectiveness of the circumscribed support obligation appended to the California 'man in the house' rule: '[S]uch adult male person is bound to support, if able to do so, his wife's children if without support from such . . . adult male person they would be needy children eligible for aid under this chapter.' The only effective sanction will probably be the mother's threat: 'Support me and the kids, or out you go!' If she does not threaten, and the children suffer, the community can intervene through the processes of the juvenile court. If the mother makes use of her sanction because her AFDC benefits are at stake, the 'man in the house' rule may have a 'deterrent effect on stable common-law unions providing a two-parent home for the child by the withdrawal of the premium.' But the only men (who have or can obtain decent employment) likely to be influenced by the

rule are: (1) those who would rather use their own income on themselves to the exclusion of their families, and (2) those who would be tempted to desert their families simply because the taxpayers' contribution to the family's income is eliminated. We wonder whether it is socially useful to encourage the stability of such two-parent families. We do not know, it is true, that children will develop more favorably without a 'father' than they will with a financially able 'father' who refuses to support them. But we have no reason for believing the contrary.. In any event, the only way to eliminate the deterrent effects of the rule would involve placing a 'financial premium' on informal relationships. Since we must either encourage or discourage the stability of these families—we are not discussing immoral families, let us repeat, but families whose stability is based solely on the continuance of a governmental income increment—it does not seem improper to adopt the course suggested by middle-class notions of family support."

The Department of Health, Education and Welfare allows states to make plans which include payments to children in families with a stepfather who owes no legal duty of support. Pursuant to recent Social Security amendments payments can also be made where both mother and legal father live in the home but are unemployed. States, however, are not required to include these broad provisions in their State plan. States with limited funds available for ADC are not able to finance such an expansion in their ADC programs. They have approved plans in which the State defines parents to include an able-bodied step-parent or a man who lives in the house who is not married to the mother but who assumes the role of father. Although some states seem to make classifications based on the assumption of the role of father by the man in the house, the Alabama Agency

does not consider this to be a good test. In the first place in the marriage relationship the way in which "people assume the role of father" takes on a variety of patterns. It is a subjective thing. Some persons may "assume the role of father" by standards which to another person may not "mean fatherhood at all." Some fathers may be fathers only because they happen to engage in cohabitation with the mother at a particular point in time but the interest and willingness to "assume a role of fatherhood" may be lacking altogether. Nevertheless, if at that particular point in time the mother did conceive and bring forth a child, the law describes this man as "the father".

The Alabama agency does not wish to make the relationship of the man in the house with the children a basis for determining eligibility. The Alabama agency considers that it is not wise to differentiate between in-and-out-of-the-home and stable relationships in a way which would require the worker to have to make a grant on a subjective relationship of the father to the children in the home. As previously pointed out this is not the relationship which the public wishes to discourage. The relationship the State is defining is that which is in and of itself a risky relationship—the relationship of regular cohabitation outside of marriage among persons who wish the State to assume the continued burden for support of the children.

In instances where the "arrangements" are less than "stable"—sometimes described as "roving" arrangements or in-and-out-of-the-home arrangements, the State is attempting to define the person who "assumes the role of spouse."

Who bears the burden of the risks involved in the informal relationships? Should the State bear them financially on a long range basis or the one who takes the

risks bear them? How can anyone say that one comes closer to the solution of the problems created thereby by passing the risk to the State. The meaning of the relationship and the necessity of having proper care for children ultimately rests on those who bring them into being. Does a State welfare department with an admittedly limited amount of financial resources to spend for ADC assume its proper role when it acts as insurer for these risky arrangements? Alabama contends that it has attempted to define the person "who assumes the role of spouse" in its substitute parent regulation in terms that the persons applying the policy can understand. Until the family can take care of those it already has, the State agency doubts the wisdom of the State assuming the risk.

Although the Social Security Act permits Federal matching funds to states who grant aid where there are two able-bodied parents in the home, under the unemployed father legislation,[9] many states have not undertaken this since the amendment makes it optional. The

[9] Title IV of the Social Security Act, Section 407; 42 U. S. C. 607. The 1967 amendments to the Social Security Act makes the sections permanent and optional for the States. The term "unemployment" is to be defined by HEW instead of the States. To be eligible a father must have had six or more quarters of work in any 13-calendar-quarter ending within one year prior to the application for assistance or have received or is qualified to receive unemployment compensation within one year prior to application. He must also have been unemployed for at least 30 days and not have refused without good cause a bona fide offer of employment or training within 30 days. Anyone who has fulfilled the quarters-of-work requirements at any time after April 1961, and anyone already receiving AFDC-U under the old plan, will be considered eligible in that respect during the first 6 months of the operation of the state plan under these new provisions. The welfare agency will be required to refer an unemployed father to a work incentive program within 30 days after the receipt of assistance, but if no suitable employment or work-training project is available assistance will be continued. This amendment became effective January 1, 1968, but a state already participating in this program will not be required to provide in its state plan for the addition of any new cases because of the provisions of this amendment before July 1, 1969..

AFDC title, like other public assistance titles in the Social Security Act and amendments, provides different options or possibilities for states with respect to the granting of aid to certain groups of persons. The granting of Federal funds operates on an incentive basis, and if a state undertakes to grant aid to a particular group the state receives a large share of Federal funds to assist the state in financing the program. Within certain limits the state can elect not to include certain groups and at the present time approximately twenty-eight states have not elected to give grants where there are two able-bodied parents in the home.

Initially and even now Section 406 of Title IV of the Social Security Act defines dependent child as meaning "a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment; * * *" Apparently through the years, even at the Federal level, this has been interpreted as "deprivation of parental support" and has meant deprivation of one or two parents. The question has, therefore, presented itself from time to time of how a state defines who a parent may be. The question has been extremely important since the patterns of living among the poor do not always fall into neat organized legally acceptable pat-

terns where clear cut legal rights, duties and obligations flow from parent to child and child to parent. The problem frequently presents itself when HEW looks at a State Plan to determine if the state has presented an acceptable definition of parent.[10]

Generally a stepparent is considered to be a person married to the mother or father of a child. If there is an able-bodied stepparent in the home, then the child would not be deprived of two able-bodied parents. It is apparent that some individuals though not actually formally married to the natural parent of the child or children, are present and a state should be able, by describing the living situation to identify such a person as a parent within the meaning of Section 406 of the Social Security Act. The problem a state faces in arriving at these types of classifications is one of being sure that the needy families wherein the parents are married are not penalized because of the legality of their marriage.

Should a caseworker be required to measure the degree of kindness, affection and other parent-child expressions, such as giving gifts, to establish eligibility? The Alabama agency submits that there is considerable wisdom in not differentiating, for public assistance purposes, between those relationships which may be less formal, that is, the true live-in situation and that which might be described as the man in-and-out-of-the-home or the roving situation. The Appendix contains a very interesting study made in Dallas County, the home of the Plaintiff in this lawsuit (A. 587). This is entitled "A Demonstration Project—

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[10] Part IV, Handbook of Public Assistance Administration 3412. *"Interpretation.* This provision sets forth the two eligibility factors, 'need' and 'deprivation of parental support or care,' on which Federal participation is conditioned. The provision requires that both need and deprivation of parental support or care exist in the individual case but does not require that an affirmative showing be made that a causal relationship exists in the individual case."

Strengthening Family Life for ADC Children Living in Homes Where Conditions Were Currently Considered Unsuitable." The project, conducted before the adoption of the Alabama substitute parent policy and completed shortly before the policy went into effect, describes among other things the importance of the relationships of the man in the house to the children. This is borne out further in the deposition of the project director (A. 116). For example, the project director stated (A. 118) as follows: "We had a very distinct impression from our work on the project that relationships of substitute father, whether part time or full time, did in the majority of cases have real meaning to the children in the family. So many of the children called the man 'Daddy,' they would distinguish between Daddy and 'my real daddy'; and one of the interesting things was that even after the relationship was broken, many of the children still maintained that relationship with a friend of the mother." The first relationship in the last sentence apparently relates to the one with the mother. The second relationship described partook of the relationship of friendship in the nature of a parent-child friendship. Later in the deposition the project director pointed out the good, positive emotional factors this second type of relationship can have in the emotional well-being of a child (A. 119, 122). The Alabama agency, therefore, believes that it is unwise to put a caseworker in the position of granting or terminating aid based on the relationship of the man in the house to the children. Alabama maintains that its substitute parent regulation is a better method of classification since it does not require the caseworker to terminate aid merely because the man in the home has shown affection, kindness, and interest in the children. The test should be whether he assumes the role of spouse. In legal unions a child derives his legal status from the marriage, not from subjective acts of kindness or even support which may or may not come from his father.

Section 401 of Title IV of the Social Security Act[11] entitled "Grants to States for Aid and Services to Needy Families with Children" provides as follows:

> "For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this title. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary of Health, Education, and Welfare, State plans for aid and services to needy families with children."

It is clear that the purpose of the State-Federal program envisages something other than a mere money payment to a family. The Social Security Act and amendments in the past few years emphasize the feature of assisting families to achieve self-support and personal independence, strengthen family life, and provide for an increased Federal share in the cost of administration when the State Plan includes the certain types of services designed to accomplish these objectives. One of the requirements includes reducing the caseload of caseworkers in order to make more services available to people. The magnitude of the problem to be solved in achieving these objectives

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[11] 42 U. S. C. 601.

can be discerned somewhat by reading Plaintiff's Exhibit No. 24, "A Demonstration Project—Strengthening Family Life for ADC Children Living in Homes Where Conditions Were Currently Considered Unsuitable" (A. 587). This project was conducted in Dallas County, which is the home of Mrs. Smith and her family—the Plaintiffs in this case. The purposes of the project are set out on the first two pages of the study (A. 590-592), and the identification of the problem areas are set out at A. 608-611. Although the project provides helpful information in recognizing the tremendous scope of the problem, it is clear that one of the difficulties in assessing the results lies in the small amount of financial assistance received by the project participants. The monthly ADC grant was much below 50% of the actual needs of the family as determined by agency standards. If 100% of need could have been met the achievements might have been far greater. Thus, the financial situation is seen as a factor which keeps one from knowing what results might have been achievable if more income or ADC payment had been available (A. 607-616). The Alabama agency agrees that man does not live by bread alone, nevertheless, it is disheartening to attempt a rehabilitation effort when the effort, to begin with, lacks an adequate means of helping the family achieve the minimum standard a state says is necessary for maintaining decency and health.

In the absence of a great commitment on the part of the taxpayer to put tremendous sums of money into helping the indigent find a way to overcome their limitations, a State welfare agency needs to carve out a role it can manage. This is the situation of the Alabama welfare agency at the present time. The State has not chosen to put large sums of money into this program, and since the initiation of the lawsuit and the appeal to this Court, Congress has shown a general unwillingness to increase the flow of Federal money to the children caught in this

situation. Nevertheless, there has been some effort made toward increasing grants of persons who are already receiving AFDC and amendments to accomplish this were also passed in the 1967 Social Security amendments. Interpretation of these seemingly contradictory efforts are explained in a draft of a letter to State agencies from the Department of Health, Education, and Welfare (Exhibit G hereto).

The Alabama regulation would not be a rational regulation under any test of law in this country if it was conceived as an instrument for racial discrimination or in its application applied as such.

If an official knowingly deprived a family of a public assistance grant or services under the ADC program in Alabama because of race, such person would not only be guilty of socially reprehensible actions, but would have probably violated State criminal statutes.[12] There has never been a moment in the State-Federal program when discrimination because of race in the grants to public assistance recipients could ever be considered within the law.[13] The Civil Rights Act of 1964 added nothing to that.

The Alabama agency asserts that Appellees have failed to establish that the Alabama agency has discriminated

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[12] Title 41, Section 206, *Public Officer or Servant Defined;* Section 212, *Willful Neglect of Official Duty;* Section 222, *Oppression Under Color of Office,* Code of Alabama, 1940, as recompiled 1958.

[13] The Handbook for the Administration of Public Assistance, Part IV, 2331, contains as a requirement for each State Plan that "no person shall be refused the opportunity to apply for * * * ADC." It must provide for a determination of eligibility or ineligibility or provide that assistance shall be paid to each eligible applicant. Any differentiation based on race has never been a part of the process of determining eligibility in public assistance. Part II, 4300, p. 2 provides "and that benefits of the programs will be equally available to all eligible persons; and that State policies, standards and methods will apply equally to persons in like situations wherever they may live."

in its formulation or application of the substitute parent policy because of race.

We do not believe the footnote[14] to the District Court's Opinion (A. 51) commenting on this intended such indictment, and the State agency would not have appealed this cause and sent the record in the case to be scrutinized by this Court if it believed that the regulation was designed to discriminate and has the effect of discriminating because of race. There is no evidence in the record to show that the Alabama agency has applied this regulation differently to any white or Negro person in the State. There are numerous opinions and views of the differences in cultural practices in respect to informal arrangements among the poor. If statistics showing number of illegitimate births give a fair picture of informal practices, it does appear that these informal practices are considerably more numerous among the lower income members of the Negro race in this country than among other ethnic groups.[15]

The Alabama agency does not believe that members of the Negro race would wish to be excused from the application of a fair rule just because of their race. Under the law it is quite clear that members of the Negro race are

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[14] "While the plaintiffs placed considerable emphasis upon facts strongly indicating that the 'substitute father' regulation was designed to discriminate and has the effect of discriminating against Negroes, by reason of the facts presented, this case does not rest upon racial considerations and therefore the decision should not rest upon such considerations. On the contrary, this decision should be and will be designed to enure to the benefit of all needy children regardless of their race or color. The Equal Protection Clause is not restricted in its application to the protection of the rights of Negroes. It is more far-reaching, protecting the rights of any identifiable class. See, e.g., the opinion of another panel of this Court, *White v. Crook*, 251 F. Supp. 401, 408-09 (M. D. Ala. 1966)."

[15] 1 Vital Statistics of the United States 1962, pp. 1-18, table 1-21. A. 218, A. 723 (See Brenz, Mary, *The Significance of the Father*, Family Service Association of America, New York, 1959, pages 69-70).

to be treated as full members of society, and this includes the low income members.

Although the ADC caseload is made up of a much larger percentage of members of the Negro race in Alabama than white, in relation to the percentage of population by race, there are statistics which show that this alone does not in any way prove that they are more "dependent"[16] as a race and in need of paternalistic differentiation. Commissioner King testified (A. 105) that among absent fathers a higher percentage of Negro fathers contribute to the support of their children than white fathers. This is borne out in nation-wide research.[17] The desire of many ADC mothers, Negro and white, to keep their children together in a family unit[18] in the face of extreme adversity should command everyone's respect. The evidence introduced attempting to show racial discrimination is not persuasive.

The percentage of Negroes on the ADC rolls increased between 1964, the year the substitute parent regulation was adopted, and 1966. In 1964 a total of 22,373 families received ADC, 66% of those were members of the Negro race, 33.7% were members of the white race, and .03%

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[16] Kaplan, Saul, *Support From Absent Fathers of Children Receiving ADC*, 1955, U. S. Department of HEW, Washington, D. C., 1960, page 36; Lefcovitz, Myron J., "Poverty and Negro-White Family Structures," Unpublished Background Paper for White House Conference on Civil Rights, Washington, D. C., November 1965.

[17] Kaplan, Saul, *Support From Absent Fathers of Children Receiving ADC*, 1955, U. S. Department of HEW, Washington, D. C. 1960, page 36—"the families with non-white unmarried mothers received contributions at a somewhat greater rate (10.9 percent) than the families with white mothers (9.2 percent)."

[18] Many ADC mothers have a sense of responsibility to their children as is evident from their interest in them. In one study it is reported that 33.4% belong to Parent Teacher Associations. Reilly, Charles T., and Margaret M. Pembroke, "Chicago's ADC Families—Their Characteristics and Problems," the Loyola University School of Social Work, 1960, pages 45-50.

were of other races. In 1966 of the total 17,157 families receiving ADC, 67.3% were Negro, 32.4% white, and .03% other. Shortly before the stay Order was vacated the percentage of the ADC caseload who were members of the Negro race was 69.5%, white 30.2%, other .03%. The only county about which extensive evidence, including detailed statistical data on its ADC program was introduced was Dallas County. As far as the evidence in this case goes, therefore, it would be the only county in which some fair conclusion may be reached. Detailed caseload studies were introduced into evidence relating to Dallas County, the home of Plaintiff Smith. In June of 1964, shortly before the regulation went into effect, the evidence showed that 97.9% of the families receiving Aid to Dependent Children were members of the Negro race and that in June 1966, nearly two years after application of the regulation began, 98.4% of the ADC caseload in Dallas County were members of the Negro race. Evidence introduced in the case showed that according to the 1960 census 57.7% of the population in Dallas County were members of the Negro race and 42.3% white. (See A. 563, 564, 565, 583-586.)

Any person who engages the professional social worker in serious dialogue learns quickly that those professional persons who engage full-time in trying to see through and untangle the eternal mystery of what to do about the poor do not believe that regular money payments to families with dependent children cause either dependency or more dependent children.[19] No doubt a State

[19] According to the 1952 nationwide ADC study, it does not appear that ADC has created an "attitude" of dependency among families. The median length of time ADC was received was twenty-five months (two years and one month). One out of five families received ADC for less than twelve months before termination. Only 11% received aid for as long as seven years, 3% for eleven years or more. Blackwell, Gordon W. and Gould, Raymond F., *Future Citizens All* (Chicago, Illinois: American Public Welfare Association, 1952), pages 21-45.

public welfare administrator has plenty of opportunities to learn that the public does not always share this point of view. And though the social worker vigorously protests that mothers are not going to bring into this world a baby in order to receive a welfare grant of $11.69 a month,[20] a spokesman for the public who resists putting more money into the program could counter, "but by giving a grant or more money, you are approving of bringing another child into existence in a family that cannot afford to care for it—you are using my tax money to underwrite a situation which is bringing about a necessity for more of my tax money—not less!" How does a state administrator, under the present ADC statutes, realistically come to grips with this dichotomy? Can a welfare administrator with a limited budget honestly deal with the public concern and ignore the basic reason children are born in these situations? Does the public have an interest in welfare agencies facing up to the reason poor children are born? The Alabama agency is convinced that children born into poor families come into being like children born into richer families—as a result of their parents cohabiting. One of the differences a state welfare administrator must face is that families who cannot financially care for these children do look to the public to help care for them. Is it, therefore, fair for the public to ask the poor not to increase the tax burden if they wish to continue receiving help?

Categorical assistance in and of itself sets out classifications of groups in order to limit the number of persons who will receive public assistance. Sometimes it appears that the arrival at a point in which a group may be considered for aid as distinguished from another

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[20] In June of 1964 the average payment per family was $48.15 or $11.69 per recipient. In January of 1967 the average payment per family was $52.68 or $12.72 per recipient (A. 70).

group which is not, the line drawn may seem arbitrary. And in one sense it is. For example, a person sixty-four years of age who has critical financial needs might wonder how the age of sixty-five was arrived at as far as eligibility for Old Age Assistance is concerned. Frequently, persons in their early sixties have critical needs; some have difficulty securing employment at that age and many do not meet the test of permanent and total disability which would enable them to receive aid for the permanently and totally disabled. That age sixty-five has often been used as a compulsory retirement age does not answer the question, as the inquiry remains as to why that particular age is used for retirement purposes. In any case the fact of drawing a line based on age appears as an arbitrary rule. But the age of sixty-five has been arrived at as a means of limiting the number of persons who shall be eligible for Old Age Assistance.[21] It appears to be an age when Congress and State legislatures have agreed that one has suddenly become old enough to be classified as "aged" for purposes of eligibility for Old Age Assistance, described as an Old Age Pension in Alabama law. This puzzle has been posed as follows:

> "Another question needing clarification is, 'Who is an older person?' Is an older person identified on the basis of productive capacity, intellectual attainments, social activity or chronological age? The arbitrary age of 65 has limited thinking and planning, giving more emphasis to the 'old' old individual than to the evolving problems of the aging process. Then, too, the categorical approach in public assistance programs has tended to create false divisions in thinking and planning; e. g., the assumption that there are no children involved in an Old Age Assistance program and

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21 Title 49, Section 17 (14), Code of Alabama 1940, as recompiled 1958; Title I of the Social Security Act, Sections I and II; 42 U. S. C. 1381, 1382.

no older people in Aid to Dependent Children. Moreover, it has contributed to the tendency to devote little attention to persons in their middle years: this constitutes a gap in understanding of the aging process."[22]

No doubt many would agree that persons sixty-five and over who have learned a great deal about life and dealing with life's problems may well be in a better position for focusing clearer thoughts, more sensible analysis and possess a better system of mental organization than the younger members of the human race. The Alabama agency agrees that:

> "Each person has a unique life history which makes him, with the passage of time, increasingly different from others in many of his habits, customs, and values. The 17 million persons who constitute the aged in American society in the mid-sixties include wealthy as well as poor, healthy as well as ill, contented as well as discontented, privileged as well as deprived.
>
> There is no such thing then, as 'the' aged; and it would be more accurate to speak of people who have grown old rather than to speak of 'the' old. People who have grown old do not all have the same needs, the same tastes, the same ways of looking at the world. It is only in a very general sense that these persons can be said to have certain common characteristics which distinguish them from the young and the

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22 American Public Welfare Association, *Planning Improved Services for the Aging Through Public Welfare Agencies.* Report of institute sponsored by the American Public Welfare Association Project on Aging, November 28-30, 1960 (Institute Leader: Eunice Minton, Chief, Welfare Services Branch, Division of Program Standards and Development, Bureau of Public Assistance, Department of Health, Education and Welfare. Recorder: Mrs. Frances Schmidt, Public Relations Consultant Specializing in Social Welfare, Reading, Ohio), Chicago, Published August 1961, page 6.

middle-aged, and which give them a unique place in American society."[23]

Nevertheless, all through the public assistance programs there are categories which define those persons to be assisted and at the same time limit assistance. A needy person who is not assisted is affected by the classification.

The increasing body of literature[24] which points out many of the inadequacies and difficulties in the present welfare system have a tendency to forget that administrators, supervisors, and caseworkers in public welfare agencies are also people, just like the poor and needy are people. The working people in public welfare agencies are supervised primarily by persons who have had training in methods and principles of Social Work. Their professional orientation, in attempting to help the poor and needy, is to help the poor discover their own strengths and learn principles of organization which will lead them out of economic dependency into greater possibilities for self-help. No doubt some persons in these fields have greater talents than others for accomplishing these purposes and helping individuals achieve higher forms of economic independence. Some teachers have greater skills than others. No doubt the overwhelming paper work which swamps social agencies (and the teaching professions) limit the amount of time which is needed to carry on the type of

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23 U. S. Department of Health, Education and Welfare, Welfare Administration, Office of Aging. "The Aged in American Society", by Bernice L. Neugarten, Professor of Human Development, University of Chicago. *Selected Papers—Fifth Annual National Conference of State Executives on Aging*, Washington, D. C., U. S. Government Printing Office, 1965, Office of Aging Publication No. 123, page 37.

24 Like Willie Morris in *North Toward Home*, the Alabama agency does not exactly understand all that is being said and discussed about public welfare and would like to share the conversation appearing on page 373 of Mr. Morris' book in lieu of attempting any detailed analysis of books and law review articles on this subject. See Exhibit H.

casework described in the Dallas County demonstration project.

In one of the articles which attempts to psychoanalyze the public welfare system, *The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions,*[25] Dr. Diamond visualizes the problem of the poor to be like the problem of the disabled who is considered to be a non-person and sharply cut off from the major benefits to be derived from society. The Alabama agency submits that where this is being done, it is not being done in accordance with the purpose of State-Federal programs and that the real problem is not in the ambivalent attitude of social agencies in failing to see the poor as persons, but in the nature of a public agency itself. A public agency derives its resources from the tax paying public. One can visualize the tax paying public as a group of individuals who can be described in psychoanalytic terms or in political terms, and by political we mean that sometimes the public is willing to put money into some programs and sometimes the public is not. For purposes of this lawsuit it would seem simpler to recognize that public welfare is a public concern subject to the political reality of limited funds. At the present time the public is not engaged in any efforts similar to the one described in *The Angel Makers* in 1803, wherein it was written. "In Manchester an almost promiscuous intercourse prevails in the great mass of people; insomuch that the magistrates attempt to check the increase of bastard children by inflicting stripes and imprisonment on the women who bear above a certain number."[26] Nor does it appear that the public is quite ready to follow

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[25] 54 California Law Review, pp. 357-362 (May 1966).

[26] Barber, J. T., "Tour Throughout South Wales and Monmouthshire, London 1803." Quoted in Gordon Rattray Taylor, *The Angel Makers,* London: Heineman, 1958, page 66.

the satirical suggestion of Jonathan Swift in *A Modest Proposal*: "For preventing the children of poor people in Ireland from being a burden to their parents or country, and for making them beneficial to the public." But the public is not putting large amounts of money in AFDC at the State level in Alabama or at the national level. The Alabama agency, a servant of the public attempting also to serve the poor, does not consider that it can solve all of the problems posed by "informal arrangements." It does not intend either to beat them or to join them. It is attempting to classify them.

II.

The Lower Court's Decree Confuses Submittals to the Department of Health, Education and Welfare of Proposed Legislation Which Related to Classification Based on the Status of Children Born Out of Wedlock With the Efforts of the Appellants to Effectuate a Classification Based on the Situation of the Family, Thus Imputing an Incorrect Intention to the Alabama Agency.

In Section 3 of its Opinion the District Court discusses the submittals of various pending bills to the Department of Health, Education and Welfare which proposals were sent by the Alabama agency. Any time a bill is introduced in the Legislature affecting the program and the State-Federal plan, the Department routinely secures a copy of the bill and sends it to the Department of Health, Education and Welfare to secure official interpretation from the Department if enactment of such measure would result in the State not being in a position to meet any Federal requirements and be in danger of losing Federal matching funds. The Opinion, after discussing the implication of the "Flemming Ruling," states as follows:

> "Even before the 'Flemming Ruling' and as early as April 1956, the then Alabama Commissioner of Welfare and the federal authorities corresponded with some frequency in an effort to determine whether the Alabama policy was in conformity with federal requirements insofar as that policy related to 'suitable family' homes, and in April 1959 the United States Department of Health, Education and Welfare by letter indicated certain substantial defects in legislation that was being proposed for the State of Alabama at that time" (A. 49).

At this point the Alabama agency submits that the Federal District Court misconceived the legal situation with respect to Health, Education and Welfare relating to the status of its plan and "suitable home." All of the correspondence in the record before the District Court pertained to and showed that the Alabama agency plan was not considered out of conformity insofar as it related to its provision for suitable homes. What was questioned was the legislation which was being proposed. The legislation referred to, H. B. 330, 343, S. B. 141 (A. 323-331), were not only Bills the Department was opposing but the Department was sending them to the Department of Health, Education and Welfare for the very purpose of securing an interpretation from them which would result in the Legislature turning down the proposals. The same thing is true about the discussion in the Opinion which states subsequently as follows:

> "In May 1959 a new suitable home policy was submitted to the Department of Health, Education and Welfare. After review by that department, it was declared 'unsuitable,' and then later, in August 1959, still another suitable home policy was sent to the federal authorities for approval, with the same results. This negotiating continued, and in June 1961 the

federal authorities replied to an Alabama submission as follows: * * *" (A. 50).

This statement clearly indicates that the Court confused submission of plan materials and regulations to the Department of Health, Education and Welfare with proposed legislation which was being sent in to the federal agency to secure interpretation in order to advise the Legislature of its conformity with federal requirements. The Opinion again reflects this confusion in the following portion of the Opinion:

> "Still later—and over two years after the 'Flemming Ruling'—the federal authorities, by letter dated June 12, 1963, advised the welfare authorities for the State of Alabama that the 'suitable home' policy bills then being submitted to the Alabama Legislature * * *" (A. 50).

Here again the Opinion confuses the submittal of an agency regulation with the transmitting of a piece of proposed legislation which was not sponsored by the agency and which the agency has traditionally opposed. The three proposals sent in to HEW made welfare benefits available by virtue of a classification based on the status of the child. This type of legislation has always been opposed by the Department of Pensions and Security. It does not reach the problem involved which the substitute parent regulation reaches.[27]

There is no evidence in the record to substantiate that the bills submitted to the Department of Health, Education and Welfare in any way reflected the position of the agency. The Alabama agency now contends that the Court's error in considering this as such has contributed to its misunderstanding as to the way in which the Alabama

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[27] Exhibit 1 contains the part of the argument appellants had urged in the Court below.

agency does classify persons eligible for public assistance in its Aid to Dependent Children program. The classification in the substitute parent policy is a classification based on the situation of the parent, not the child, and the Alabama agency contends that the way in which Alabama makes this classification is a fair and reasonable method which does bear a rational relationship to its Aid to Dependent Children program. The Alabama agency contends that the District Court misconceives the substitute parent policy. The policy relates to the parent and the cohabitation of the parent with a person the Alabama agency calls a substitute parent. This is not a "semantical gimmick". It reaches the public policy problem which is really involved. By this method Alabama does predicate public aid upon the willingness of the persons who look to the State for help to discontinue those relationships which in and of themselves are likely to bring about more children who would require more help from the taxpayers. This is not a penalty upon illegitimate children or any other kind of children but a refusal to make payments to a person or parent who does not wish to stop those types of relationships which are likely to cause more tax burdens. Is this a violation of the Equal Protection concept? Is this an arbitrary or irrational classification? Commissioner King has made it clear that the principle involved is extremely important to those persons who determine what share of money will go into the welfare programs, those members of the legislative body who appropriate money for welfare purposes and who reflect the public interest. Alabama is maintaining that the parent has the primary responsibility to care for any children which are brought into the world.

The agency itself is not judging the morals of the poor but is using cohabitation as the test of eligibility because cohabitation in or outside of marriage is the cause or reason that more children are conceived. If the re-

sponsibility of providing for the increased number of children means that the public must pay for their care, the public has every reason to ask those persons who want the public's help to stop the conditions causing them.

The identification of this public interest as a background for the development of this policy was misunderstood by the lower Court. The precise words which illustrate the confusion of the lower Court occur when the Court stated as follows:

> "The expressed interest of the State of Alabama in not desiring to underwrite financially or approve situations which are generally considered immoral is a laudable one; the State's argument that this regulation is 'a genuine attempt to place the responsibility for taking care of children on persons who bring them into being' is, however, wholly without any realistic or rational basis insofar as this 'substitute father' regulation is concerned. The punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regulation. The State is not without means of attempting to solve the problem which it recognizes, short of depriving children of aid because of immoral conduct of the mother. * * * The State's argument, implied throughout the brief, that the 'substitute father' regulation has a rational basis to the definition under 42 U. S. C., § 606 (a) of dependent child(ren) who are to receive aid under the Act, by reason of the public's concern over the continued procreation of illegitimate children by persons who seem economically unable to care for them, is utterly unrealistic" (A. 56-57).

The Court chooses the language that the punishment under the regulation is against needy children, not against the participants in the conduct condemned by the regu-

lation.[28] The Alabama agency contends that this statement entirely misconceives what an ADC grant to a mother is. This grant involves a regular payment of public funds to a person to assist him (or more generally her) in her primary duty of support to a child or children. Since there is no requirement that the State undertake an Aid to Dependent Children program, it is clear that unless the State agency has received by court Order the custody of a child, the State is not assuming responsibility for the child. The State is agreeing to assume some responsibility to make a payment to help the grantee relative, who is generally the mother, carry out her primary responsibility. As the public becomes more weary of investing funds in this program a state agency must in turn scrutinize its proper role in the situation it is in.

Another fallacy in this portion of the Opinion occurs when the Court writes that the State is not without means of attempting to solve the problem which it recognizes, short of depriving children of aid because of immoral conduct of the mother (A. 57). The regulation is the exact opposite of condemnation. At any time the mother wishes to discontinue the regular relationship of cohabitation, she may under the very terms of the policy itself become eligible again. Whereas Scripturally the great requirement for releasing from condemnation a woman taken in adultery was "go and sin no more,"[29] the Alabama regulation goes considerably further in its

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[28] In the Court below there were occasions when the Alabama agency made reference to children who are born out of wedlock. In using the expression "illegitimate children" the Alabama agency does not intend to place any deprecation upon the children. It is not the children or their presence on this planet which is being classified in this case—only the situation of the parents. The portion of the Alabama agency's Brief, quoted by the Court, does appear to have been out of context of the meaning of the agency and, therefore, that portion is set out in this Brief as Exhibit J.

[29] John 18:11.

no condemnation concept. Thus, the mother is given up to sixty days to present her evidence before her application is disapproved or her case closed in the event she wishes to prove to the agency that she is discontinuing the relationship. Further, in the event the applicant or recipient does not wish "to go and [cohabit] no more" in the words of the regulation "the worker will talk with the mother about reasons for the agency's action and about her right to reapply at any time that she does break the relationship. If the family is otherwise eligible, the case should be recertified for aid immediately" (A. 428). Just because cohabitation out of wedlock may also carry with it a theological connotation of "sin" and by law be "illegal," the Alabama agency does not consider that it should be prohibited from making reasonable classifications without being accused of making moral judgments. If the parent cannot provide for the children and must call upon the State for help, then the public has every right to ask that she not keep herself in a situation that is likely to produce more tax burdens.[30] The confusion over the ADC plan is shown further in the Court's Opinion illustrated by the following statement:

> "Under the Alabama Support and Desertion Laws (Title 34, §§ 89-104) and the Alabama Paternity Statutes (Title 27, §§ 12(1)-12(9)), the father of children born out of wedlock may be required to support and maintain the children from a financial standpoint. Under Alabama Welfare Agency policies or regulations, if the home situation is considered unsuitable

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[30] The Alabama agency also is not claiming that children of ADC families turn out a lot worse than other children. Actually studies have shown that children in these families have a lower rate of "delinquency" than the national norm and this is also true in Alabama. See "A Demonstration Project—Strengthening Family Life for ADC Children Living in Homes Where Conditions Were Currently Considered Unsuitable" (A. 610).

appropriate action may be taken to place the needy children under the care of a Juvenile Court."

When the lower Court points out that under Alabama's desertion and support laws and paternity statutes that the father of children born out of wedlock may be required to support and maintain the children, the Court does not recognize that the man in the home may not be the natural father. In the situations involving roving arrangements it is not always possible to identify the natural father. The Alabama agency does make every effort to secure support in these instances. This was set out in the public assistance plan which was Plaintiff's Exhibit No. 4, which was before the Court and begins on page 363 of the Appendix. The Court then states: "under Alabama welfare agency policies or regulations, if the home situation is considered unsuitable, appropriate action may be taken to place the needy children under the care of a Juvenile Court."

This portion of the Opinion which shows a clear misunderstanding of "unsuitable" misses the entire concept which the Alabama agency has attempted to develop through the course of these proceedings. The Alabama public assistance plan, approved by the Department of Health, Education and Welfare, contains a section entitled "Criteria for Evaluating Home Conditions Which May Be Hazardous for Children and Procedures to be Followed When These Conditions Exist." This is found on page 458 of the Appendix. "Suitability" is a matter of degree and involves a type of subjective judgment which actually is not useful in discussing what is being done in public assistance and child welfare and areas of responsibility. Child welfare workers do not initiate proceedings in juvenile court simply because in someone's mind the home may be unsuitable. Whereas on one hand a welfare agency may work with a family to assist them in achieving (1) a higher standard of living, (2) principles of organization

which would enable the family to overcome "dependency." (3) assist the family in achieving better health for its members, the type of judgment which would cause a worker or agency to petition the juvenile court for the removal of a child or children from the care and control of parents is a drastic one. It is undertaken only when the agency considers that certain conditions exist which may be hazardous to children and where there is no hope that the family will be able to provide sufficient guardianship. The criteria for evaluating these homes is set out in the Alabama manual in Chapter II, pages 46-49, which begin on page 458 of the Appendix. The commitment of the Alabama agency is to evaluate whether: (1) physical care and protection is within the means of a parent, (2) there are drastic instances of lack of supervision, guidance and discipline, (3) there is exploitation of children, (4) there is protection from degrading conditions, and (5) there is child abuse and physical cruelty. The commitment further states the following:

> *"Procedures to Be Followed When Home Conditions Exist Which May Be Hazardous to Children.*
>
> Unless the welfare of the child calls for a petition to the court, the parent or other grantee relative will be expected to take steps to improve the situation in the home. The counsellor will help the parent or other grantee relative in areas where he can. At the end of three months, a re-evaluation will be made and next steps decided upon. Continue to work with the parent or grantee relative toward further improvement and set a new date for evaluation, not later than three months.
>
> *Procedures to Be Followed When Court Action Is Initiated.*
>
> Sometimes it is necessary for the county department to file a petition for the immediate removal of a child

from his home in an extreme situation, but most often this is not the case.

If the worker and county director agree that a petition should be filed for removal of a child from his home, the record must show what condition of unsuitability exists, what ill effect it has had or is expected to have on the child, what efforts have been made to help the parent improve the situation, the alternate plan which has been made for the child's care and how he is expected to benefit by it" (A. 462-463).

It is clear, therefore, that the use of the terminology surrounding the State plans with respect to hazardous homes, which sometimes are referred to as unsuitable homes, has tended to confuse rather than to help clarify the real purpose of the substitute parent policy.[31] Both the Department of Health, Education and Welfare and the Court below have complicated a rather simple issue by making an assumption that the Alabama agency is making a moral judgment upon the homes of persons living in substitute parent situations and, therefore, immediately withdrawing from the situation because of this moral judgment. This is not only untrue but it is precisely contrary to the required provisions of the Alabama Manual just set out and described—all appearing in the Appendix on pages 458 through 468.

The problem in the Flemming Order which needs clarification in this suit revolves around the following language:

"It is completely inconsistent, however, to declare a home unsuitable for a child to receive assistance and at the same time to remain in the same home exposed to the same environment."

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[31] The position of the Department of Health, Education and Welfare in the lower Court is probably contained in the letter to the District Court from the Justice Department. See Exhibit K.

The Alabama agency submits that it is not "declaring a home unsuitable." It is defining arrangements which are similar in some respects and different in other respects to legal marriages. In describing arrangements which resemble polygamy or polyandry and pointing out that they are not within customary legal concepts "legal", the agency is not declaring the home "unsuitable". If it is altogether unsuitable, the agency must by its own regulations initiate plans which can include court action to make other provisions for any child or children in that home.

The Alabama agency considers a classification based on the relationship of the adults a reasonable classification.

III.

The Court Was Not Correct in Striking Down the Entire Regulation When Only Part of It Applied to Plaintiff and Her Class and Without Giving Any Reason Why the Other Parts Offended a Constitutional Guarantee.

There is significant difference in the types of practices involved in subdivision one of the policy and the other parts of the regulation. The Alabama agency seriously contends that no Order or Decree should be sustained on the basis of a class action whereby the Plaintiff is named as a representative of a class which has marked differences from the other classes of persons affected by the substitute parent regulation.

The injunction in the lower Court applied to everyone removed from the Alabama ADC rolls because of the substitute parent policy. This even included persons who were involved in a true live-in situation. No reason was given why this offended any constitutional guarantee. One of the difficulties a state with a limited program has is how to delineate fair sub-classifications of "informal ar-

rangements". The Alabama agency does consider that the way in which a State arrives at these classifications and definitions reaches to the heart of fair play in public assistance.

Obviously the Plaintiff in this lawsuit represents a smaller group of persons affected by the regulation than the total groups affected by the regulation. The types of groups affected are described as follows: "An able-bodied man, married or single, is considered a substitute father of all the children of the applicant/recipient mother living in her home, whether they are his or not, if: (1) he lives in the home with the child's natural or adoptive mother for the purpose of cohabitation."

The Alabama agency urges this Court to permit the type of classification in its public assistance program set out above. The Plaintiff in this lawsuit, by the facts presented in this case, did not belong to this group of persons. By throwing out the entire regulation and ordering the reinstatement of these persons, the Alabama agency contends a court is supporting a policy which in effect is discouraging marriage[32] and a way of life and depriving dependent children of a stability in the home which is not acquired in less formal arrangements.[33]

The Alabama agency submits that such "able-bodied man" is "there" when he lives in the home and cohabits with the mother and such an arrangement should not be

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[32] The agency has found that a number of persons in families who had been removed from the ADC rolls because of the substitute parent regulation had married after aid was terminated. See Exhibit E.

[33] The Project Director, Miss Clara Mae Lloyd, did state that whereas some of the relationships found in informal arrangements were good and healthy as in formal marriage situations "it is not the ideal, because we would hope they would be more permanent; * * *" (A. 122).

favored for public assistance purposes over ones in which the mother is legally married to the man.[34]

The second group includes the able-bodied man if: (2) "though not living in the home regularly, he visits frequently for the purpose of cohabiting with the child's natural or adoptive mother." Some in this group approximate the type of practice known as polygamy or polyandry.

What constitutes marriage is defined in different ways in different societies. In some, a man and woman are considered husband and wife if they have had sexual relations, whether or not the relationship has been sanctioned by the couple's kinship or a marriage payment made. In others, bride wealth must be paid in full before establishing the conjugal relationship, and a marriage is not completed, or confirmed, until one or more children of the union have been weaned. Monogyny is found in all African societies, but polygyny is found in most. In the Lele of the Kasai district of the Belgian Congo a specialized form of polyandry, or the marriage of one woman to two or more men, sometimes occurs concurrently with the predominating polygynous marriage, and this may also be true of other societies.[35]

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[34] There are no doubt many millions of words spoken on the subject of marriage and its strengthening effect on the family. The Alabama agency considers the late Archbishop William Temple's statements of the reasons therefor persuasive and appropriate:

> "But the inherently social and indeed 'familial' character of man finds its first expression in the human family. This is the initial form of man's social life, and its preservation and security is the first principle of social welfare." * * * "But any ordering of society which impairs or destroys the stability of the family stands condemned on that account alone;" * * * "The aim within the nation must be to create a harmony of stable and economically secure family units;" *Christianity and Social Order*, S. C. M. Press Ltd., pages 54, 55, 56.

[35] Ottenberg, Phoebe, and Simon, et al. *Cultures and Societies of Africa* (New York: Random House, 1960), pages 20-33.

The whole system of obligations and rights which constitute marriage is in each society laid down by tradition. There are many variations of all this as well as the ways in which the rules are enforced. But it must be added that in no other subject of anthropology is our knowledge so limited in the dynamic problems of why rules are kept, how they are enforced, and how they are evaded or partially broken.[36] It may be that the terms polygyny and polyandry or roving arrangement also describes the practices engaged in by "hippie" cults. One description of this situation in Dallas County, the home of Plaintiff, is found in the testimony of the County Director in that County (A. 185-186).

Formalized polygyny in the American society has not been upheld.[37] Is there any reason why similar informal practices should be favored in public assistance? Is there any reason why these practices cannot be classified and identified so that they will not be favored over monogynous practices? The mere fact that such practices may be said to go on among wealthier members of society gives no sanction for actually favoring them. The Alabama agency submits that it is still the law in all the jurisdictions in this country that one man have one mate at a time. Children, however, with respect to parent-child relationships do not have this singularity thrust upon them by the law. They are still free to live with a mother and a stepfather or a father and a stepmother or any other arrangements which the adult world finds in keeping with blood lines or convenient, "suitable" or "in the best interest of the child."

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[36] Malinowski, Bronislaw, *Sex, Culture and Myth* (Harcourt, Brace and Gould, Inc., New York, 1962), pages 16-17.

[37] *Cannon v. United States* (1885), 116 U. S. 55, 6 S. Ct. 278; *Church of Jesus Christ of L. D. S. v. United States* (1889), 136 U. S. 1, 10 S. Ct. 792, 34 L. Ed. 478; *Davis v. Beason* (1889), 133 U. S. 333, 10 S. Ct. 299, 33 L. Ed. 637.

The Alabama agency does not consider favoring informal polygyny or polyandry in its public assistance program a useful method of helping children find environmental stability. This agency does not have the resources to meet some of the real problems[38] said to be at the root of the reasons that ADC mothers will get in these situations and the situations set out in the next aspect of the policy. If the Plaintiff in this case was cohabiting regularly with an able-bodied man in her own home even though he had another mate, it would appear that the second part of the regulation would apply. It would also appear that this is the only group the court order should have reached.

The third part of the policy provides that an able-bodied man, married or single, is considered a substitute father of all the children of the applicant/recipient mother living in her home, if * * * "(3) he does not frequent the home but cohabits with the child's natural or adoptive mother elsewhere. Pregnancy or a baby six months or under is prima facie evidence of a substitute father as indicated above."

It would appear that the primary purpose of this portion of the regulation is to keep a mother from continuing to receive public aid merely by showing that the relationship takes place outside the home only. The agency contends that the tax paying public does not want the mother to continue to receive public aid unless she agrees to help keep herself away from situations which are

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[38] In describing the behavioral aspects of persons who are caught up in informal living arrangements, one study points out that in casework practices virtually nothing has been done to understand and change their behavior. It has been stated that this problem behavior among all races will continue until efforts are made to grapple with the complex individual and cultural problems of which illegitimacy is only a symptom. Reilly, Charles T., and Margaret M. Pembroke, "Chicago's ADC Families—Their Characteristics and Problems," the Loyola University School of Social Work, 1960, pages 45-50.

likely to cause more children who will need more public aid.

Following the third part of the regulation there appears the following language: "pregnancy or a baby six months or under is prima facie evidence of a substitute father as indicated above." This, of course, is the best evidence that there has been cohabiting. It puts the burden on the ADC mother to show that the cohabitation has stopped and the methods for showing that it has stopped are set out in the rest of the regulation (A. 428).[39]

The primary purpose of the entire regulation is to place the responsibility for support of the family on men who enjoy the privileges of a husband instead of placing such responsibility on the State. In view of this purpose it can be seen how all parts of the regulation are related to identifying the man who assumes the role of husband when there has not been a formal marriage.

The Court below did not spell out Constitutional guarantees which other parts of the policy, other than that affecting Plaintiff and her class, offended. The Alabama agency considers the decision and the Court Order defective in this respect and urges that clarification be given if other aspects of the regulation are offensive to any Constitutional guarantees.

Are there any Constitutional guarantees which have been or are likely to be offended by application of any aspect of the regulation? The Alabama agency considers that public assistance applicants and recipients are entitled to the following:

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[39] The new 1967 public assistance amendments to the Social Security Act require a plan of family and child welfare services as may be necessary in the light of home conditions and other needs. This includes the further objective of preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life. P. L. 90-248, 81 Stat. 878.

1. The right to have any regulation applied reasonably.

2. The right to receive the money payment and services if eligible.

3. The right to every procedural safeguard provided by statute and regulation and to confidentiality and equity of treatment.

The Alabama agency does not consider that public assistance applicants and recipients have the following rights under the present Federal-State program:

1. The recognition of anything like a "property right" in public assistance.

2. Any right which is inconsistent with the right of the State to abolish any given public assistance category.

If there is no vested right to cohabit out of wedlock,[40] is there a right of privacy which protects the Plaintiff in this case and others similarly situated from revealing information relating to their cohabitation practices, if any, for the purpose of establishing ADC eligibility? The Alabama agency believes that everything really hinges on the rationality of the rule. If the rule is rational then it should be clear that the State can as a condition precedent to granting aid require the Plaintiff and others similarly situated to reveal necessary facts for the establishment of eligibility. This is the primary responsibility of the applicant. Under the present public assistance system, the State is charged not only with determining the financial condition of persons in order to find out if they are eligible to receive a public assistance grant, but also the State is charged with the responsibility of rehabili-

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[40] In *Griswold v. Connecticut*, 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, the right protected belonged to *married* persons.

tation and other services as far as practicable under the conditions in such State. Just as one does not go to a physician and ask for healing then refuse to tell the physician facts which would assist the physician to heal, it would seem unreasonable for an applicant or recipient in public assistance to claim some right to withhold information relating to facts the agency would need to know to accomplish its statutory purpose of establishing eligibility or rehabilitation. Any employee in the agency who divulges confidential information contrary to statute would be subject to criminal prosecution. Title 49, Section 17 (7), Code of Alabama 1940, as recompiled 1958.

If the rule is reasonable, the Alabama agency contends that the case worker has every right to secure facts relating to the matter of financial eligibility and information necessary to rehabilitate. Whereas on one hand the State wishes to be in a position to assist persons in the period of time they are dependent upon the State for help, the agency at the same time is charged with the responsibility to "help such parent or relative to retain capability to the maximum self-support and personal independence * * * " By the same token the persons who accept a grant are expected to cooperate in the State's efforts to make them personally independent of the State.

The Alabama agency respectfully submits that it cannot accomplish any of the purposes and aims of the Social Security Act in its own State statutes and fail to ask questions relating to matters which most people do frequently consider private zones. Unfortunately, these private zones are likely to be the very zones which stand in the way of achieving personal independence. The Social Security Act does require the agency to have safeguards relating to confidentiality However, the public assistance titles of the Social Security Act do not grant

any right to public assistance applicants and recipients to remain dependent.

The Alabama agency also contends that there is no constitutional prohibition against middle class morality even though it is the agency's contention that the substitute parent policy primarily sets out a definition concerning the responsibility of people and is not judging their morals. The mere fact that the regulation may also reflect middle class notions of family support does not make it unconstitutional. It may, according to some authorities, be a little un-Freudian,[41] but the Alabama agency does not believe that that defect should necessarily be fatal.

In discussing the unique aspects of public assistance which limit the scope of privacy which any individual can have and be declared eligible Professors Handler and Roseheim have written as follows:

> "It is precisely the unusual circumstance to which public assistance is oriented in its proclaimed concern to relieve individual need. Simply because no legislative determination of social policy can cover all contingencies, the design and administration of public assistance necessarily concentrate on the unique personal circumstances of the recipients. To fulfill the commendable goal of relief of a person's suffering requires an intimate knowledge of his appetites and needs. *The very approach of public assistance demands varying degrees of exposure of the applicants' lives and affairs to those who administer it.*" (Emphasis supplied.)[42]

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[41] "The Children of Leviathan: Psychoanalytic Speculations Concerning Welfare Law and Punitive Sanctions." 54 Cal. L. R. 357 (May 1966).

[42] "Privacy in Welfare: Public Assistance and Juvenile Justice," Vol. 31 Law and Contemporary Problems, p. 379 (1966).

It is also clear that there can be no property right to public assistance under the present State and Federal statutes. In his article entitled *The New Property* Professor Reich writes as follows:

> "If the individual is to survive in a collective society, he must have protection against its ruthless pressures. There must be sanctuaries or enclaves where no majority can reach. To shelter the solitary human spirit does not merely make possible the fulfillment of individuals; it also gives society the power to change, to grow, and to regenerate, and hence to endure. These were the objects which property sought to achieve, and can no longer achieve. The challenge of the future will be to construct, for the society that is coming, institutions and laws to carry on this work. Just as the Homestead Act was a deliberate effort to foster individual values at an earlier time, so we must try to build an economic basis for liberty today —a Homestead Act for rootless twentieth century man. We must create a new property."[43]

So long as the Professor uses the future tense and agrees that such right does not exist right now in public assistance, the State agency must agree at least that everyone needs sanctuaries or enclaves where no majority can reach. We do not know if the still dews of quietness, the coolness and the balm, can ever be found in the realm of property or anything temporal which human law purports to govern. The Alabama agency does not believe that these desirable green pastures can be achieved under the law as it now exists. Nevertheless, under our system of government it seems unlikely that the Chairmen and Members of the Ways and Means Committee of the United States Congress and their counterparts in State legisla-

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[43] 73 Yale Law Journal 733, 787 (April 1964).

tures would ipso facto see that the necessary appropriations were forthcoming to make such dreams realities. At this moment in our society it does not appear that it is unconstitutional either to be poor or not to be poor, nor does it appear that there are any vested rights in penury or poverty.[44]

Does the regulation in placing the burden of proof upon the mother to show that the relationship is terminated and that she is entitled to benefits violate any due process concepts by violating the mother's right against self-incrimination? When a mother goes to a State prosecuting attorney and asks him to help her get support under Alabama's paternity statute, the Alabama agency knows of no case in which the prosecuting attorney has then prosecuted her under the adultery or fornication statutes. Nevertheless, in order to secure help from the State prosecuting attorney, who by statute is the correct official to assist the mother in obtaining support,[45] she is laying bare the facts which could make her subject to prosecution for fornication or adultery. The Plaintiff has not shown that there has been or is any threat of prosecution because of information she has given the welfare agency. Obviously this case is not ripe for a decision relating to self-incrimination. *Poe v. Ullman* (1961), 367 U. S. 497, 81 S. Ct. 1752, 6 L. Ed. 2d 989.

There is one important difference in discussing the matters with a public welfare worker. In arriving at the question of her eligibility, the mother is protected in her application for public assistance by state statutes requir-

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[44] *Edwards v. California* (1941), 314 U. S. 160, 176, 62 S. Ct. 164, 86 L. Ed. 119; *Smith v. King*, 277 F. Supp. 31; *Ward v. State*, 170 So. 2d 500 (Alabama Court of Appeals application for rehearing overruled and cert. denied January 7, 1965, 170 So. 2d 504).

[45] Title 27, § 12 (3), Code of Alabama 1940, recompiled 1958.

ing confidentiality.[46] The Alabama agency contends that confidentiality requirements concerning information about welfare recipients relates to the requirement of giving necessary information to establish eligibility in a way analogous to that in which immunity provisions enable the compelling of testimony which would otherwise be privileged under the Fifth Amendment to the United States Constitution. See 58 Am. Jur., Witnesses, § 84 et seq.

Does the giving of the information to a caseworker place an unfair set of choices unrelated to ADC upon the client? The Alabama agency does not know the answer to ending practices which result in bringing into the world more children to parents who cannot care for them. But agreeing with the practices and favoring them in public assistance practices does not seem to be the answer. We do contend that nothing is so futile as the unhampered satisfaction of sporadic impulses. This is the sort of existence which leads through boredom to suicide.[47] Does a public assistance agency exercise responsible leadership by favoring freedom to exercise unhampered satisfaction of sporadic impulses? It has been said that freedom is a great word but like other great words is often superficially understood. To those who have enough of this world's goods the claim to freedom means "Leave us alone" but to those who have not enough it means "Give us a chance." The important difference of interpretation rests on a single understanding of freedom as absence of compulsion or restraint. However, if that is all the word means, freedom and futility are likely to be so frequently combined as to seem inseparable. "Freedom so far as it is a treasure must be freedom

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[46] Title 49, § 17 (7) (8), Code of Alabama 1940, recompiled 1958. See also regulation protecting confidential information (A. 866-870).

[47] William Temple, *ibid.*, p. 60.

for something as well as freedom from something. . . . Law exists to preserve and extend real freedom.''[48]

In the ADC process the presumption is that the mother can make good choices and use the money which is being granted for the benefit of her children.[49] It is presumed that she has the ability to carry out this purpose; without this presumption the State would, under its present commitment, need to initiate other plans for the children.

The entire process between the caseworker and the client involves trust. It has long been a Federal requirement and a basic practice in public assistance that the primary source of information regarding eligibility is the client. This basic concept in public assistance is set out in the Federal Handbook of Public Assistance Administration,[50] and because of the necessity to understand the primary way the agency reaches a decision about a case, this is set out in full:

> ''a. The requirement that a plan provide that applicants and recipients will be relied upon as the primary source of information regarding their initial and continued claim for assistance does not relieve the agency of the responsibility to recognize the differing capacities of applicants and recipients to discharge their responsibilities to the agency. Some can provide or obtain needed information after the agency explains what information is needed; others will need specific directions to sources of information;

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48 William Temple, *ibid.*, p. 61.

49 Alabama does not make "protective" public assistance payments except to guardians and duly appointed legal representatives both appointed pursuant to statute.

50 Part IV, Section 2230.5a—For new Federal requirements pertaining to Determination of Eligibility and Furnishing Assistance, see Exhibit L.

others may want, or have to rely on, the agency to obtain the information for them.

If the individual is unable to participate in the determination of eligibility, because of such circumstances as physical or mental disability, inability to speak English, or other difficulties, the agency is obliged to take measures to provide him the assistance and services for which he is eligible.

Reliance on applicants and recipients as the primary source of information will enable the agency to determine initial or continuing eligibility in a large percentage of cases on the basis of information provided by the individual, supplemented if necessary by information from public records. Such reliance on the individual includes placing responsibility on recipients for notifying the agency, on the basis of instructions understood by them, about changes in their situations that may affect the amount of assistance to which they are entitled or may terminate their eligibility.

When available information is inconclusive, reliance on the applicant or recipient as the primary source of information requires the agency to explain to the individual, in writing if necessary, (1) what questions remain and how he can resolve or help to resolve them, and (2) the necessity for resolving the questions if eligibility is to be established or continued. If the individual is reluctant or unwilling to help resolve the question or permit the agency to do so, the agency is responsible for considering carefully with him from deciding unnecessarily or unwisely to withdraw from the program when he is eligible, and to discharge the agency's responsibility for evaluating whether facts had previously been presented correctly. (See IV-2600 re Fraud.)

If the individual is unwilling to have the agency seek verifying information, the agency may not be able

to determine eligibility and thus have no recourse but to deny or terminate assistance. In such instance, the individual should be told that he has the right to re-apply at any time."

It is, therefore, necessary that a presumption of trust exist and it is necessary that the agency maintain a vigilance and determination that in this process and in the necessity for achieving the aims of the Social Security Act that the agency does not yield to the "ever present risk of turning a Good Samaritan into a 'pursuing Fury.' "[51] The Alabama agency suggests that rather than yield to the current temptation[52] to visualize personnel in public welfare agencies as "pursuing Furies," that this Court realistically consider that the public assistance personnel in our society have some similarities and some problems in common with the members of the judicial profession. For example, the caseworker, as well as the administrator or supervisor, must arrive at a determination and conclusion of what the facts are and apply the law in the case which would be the public assistance regulations. The problem is that the caseworker like a member of the judicial profession must say eventually "yes or no," not "yes and no". Any time a firm "no" is said resulting in termination of a grant, there is always the possibility and the probability that the client will not like it. If eligibility is determined incorrectly and a person receives public assistance which under the regulations he is not entitled to the public does not like it.

Certainly one of the aims of casework service is to help the mother escape from her own sense of emotional need so that she can be about the constant task of making good provision for her children. If this Court believes the testi-

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[51] 31 Law and Contemporary Problems, p. 411, citing Charles Dickens, *Our Mutual Friend*, 506 (Oxford, 1952).

[52] Increasingly legal literature and other literature visualize the welfare system and individuals involved in it as "punitive."

mony of the caseworker, the Plaintiff would be considered to fall in category two of the regulation. In granting a service the grantor does need to be aware of when the granting of the service (money and service) tends to perpetuate the wrong set of values or even foster dependency itself. To give a mother a choice in this type of situation does not militate against any constitutionally guaranteed freedom. If this choice is not given, the regulation is not being followed. In the testimony of the Plaintiff, whose testimony on this point is in conflict with that of the worker, if this Court believes the Plaintiff, the regulation would not have been applied correctly and could have been subject to correction by an administrative appeal.

IV.

Plaintiffs Should Be Required to Exhaust Their Administrative Remedies Prior to Bringing Action in Court.

The Alabama agency does not consider that *Damico v. California,* 388 U. S. ..., 88 S. Ct. 526 ... L. Ed. 2d ... (December 18, 1967) has completely settled this question. Since the particulars of the California administrative appeal provision were not set out in the Opinion, it is not clear why the administrative remedy would not have been adequate. The Alabama agency appeal procedures were promulgated pursuant to the Federal Social Security Act. The new regulations promulgated by the Federal agency thereunder are set out as Exhibit M hereto. These administrative appeal procedures provide for prompt hearing in the county where the claimant lives. One of the functions of the administrative appeal hearing is to assist the claimant in establishing eligibility and not merely to review the prior action with which he is dissatisfied. The claimant is the only party to the hearing and by regulation is not "opposed" at the hearing by either the State

or County Departments of Pensions and Security (A. 856). If a regulation had been incorrectly applied or if information became available which had not previously been considered in determining the client's eligibility, this would provide a speedy remedy to get these issues settled. Although the client may be represented by counsel it is not necessary, and under the agency practice the Hearing Officer has as one of his functions to assist the client in establishing eligibility by bringing out any evidence which would tend to establish eligibility. The Alabama agency would hope that attention could be given to the intent of the provisions of the Federal Social Security Act, 42 U. S. C., § 201, et seq., as it relates to the Alabama appeal procedure recognizing the requirement that the plan must provide that Aid to Families with Dependent Children shall be furnished with reasonable promptness to all eligible individuals, and must provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid is denied or is not acted upon with reasonable promptness. In Alabama, by agency plan, the hearing must be held within 50 days of the time the appeal is taken and the decision must be reached within three weeks after the hearing. Under the new federal requirements (Exhibit M) requiring retroactive payments it would appear that individual recipients would have a prompt method of actually getting a payment if eligible. In the event this Court should later receive a large number of cases[53] involving public assistance problems it would appear that the exhaustion of the State administrative remedies would be a service to the Court and a fairness to the State agency. This way any questions of correct application of policy to facts would be

[53] Since one of the new services offered the poor is legal services available in many communities through projects set up by the Office of Economic Opportunity, and the favorite Defendants are Welfare Departments, this Court should have many cases involving public assistance problems.

settled at the administrative level. Particularly in class action where lower Courts would be reluctant to grant a temporary injunction in a class action involving thousands of persons, as was true in this case, the better procedure, it would appear, would call for exhaustion of administrative remedies. The Alabama agency re-emphasizes its point that there has been no time in the State-Federal working relationship created by Congress when discrimination because of race in the determination of eligibility for public assistance grants has been permitted. It would, therefore, appear that the Civil Rights remedies would have relevance only where it can be shown that such rights have actually been violated. Otherwise, it would be sufficient merely to allege a violation under a Civil Rights Act in order to avoid an administrative appeal.

V.

The District Court Decree Did Not Provide Proper Safeguards for Confidentiality Concerning the List of Persons Required to Be Filed in the District Court.

Pursuant to Federal statute and requirement the Alabama Legislature has enacted the following provisions of law relating to confidentiality:

> "It shall be the duty and responsibility of the state department to * * * (8) Establish and enforce reasonable rules and regulations governing the custody, use and preservation of the records, papers, files, and communications of the state and county departments. The use of such records, papers, files, and communications by any other agency or department of government shall be limited to the purposes for which they are furnished and by the provisions of the law under which they may be furnished. All case records of recipients of assistance shall be considered confidential

and not public writings and shall not be subject to public use or inspection. At each session of the circuit court, however, the director of public welfare in each county shall, upon request, submit to the grand jury a list of persons receiving public assistance in the county or division of the county covered by the court, and the grand jury may examine the list of public assistance recipients within the county and make such investigation in regard thereto as may be necessary to vertify the accuracy of the same. It shall be the duty of the presiding judge to charge the grand jury at each session that it may make such investigation. The information obtained from either the state or county welfare departments by the grand juries in investigations shall be subject to the same safeguards with respect to the confidential nature of such information as prevails with respect to such records and information while in the custody of the county or state welfare departments. Confidential information concerning applicants and recipients shall not be used or disclosed for any purposes not directly connected with the administration of public assistance, or the investigation thereof by grand juries. Any violation of this provision shall be a misdemeanor and punishable accordingly.'' Title 49, Section 17 (7), Code of Alabama 1940, recompiled 1958.

One reason the Alabama agency does not consider problems relating to rights of privacy and rights against self-incrimination is because of the Federal requirement and responsibility of the State agency to keep private matters confidential. The Alabama agency considers that the only instance in which information about public assistance clients can be divulged is in connection with the administration of public assistance itself or with the permission of the client. Confidentiality of information furnished to grand juries is protected by statute and regulation (A.

846-850). Lists containing names of recipients and amounts paid to them are required to be filed with Probate Judges (A. 846-850). Those lists contain the names of all public assistance recipients (excepted from public view are records pertaining to children placed for adoption). It is quite a different matter to make public a list of a particular segment of the public assistance rolls who are affected by a specific policy. Such a list would not serve the purpose for which the required total list is designed. The list involved in this case identifies persons whose public assistance grants have been affected because of their cohabitation out of wedlock.

On January 31, 1968, following the vacation of the Stay Order by Justice Hugo L. Black, the Alabama agency filed a Motion with the lower Court and among other things moved the Court "to issue an appropriate order to protect the list of the names and addresses of persons restored to the Alabama Aid to Dependent Children rolls from public disclosure and to protect the confidential nature of the list." The lower Court did not grant the relief sought. Attorneys for Appellants have been advised orally by members of the District Court that the list will be for the use of the Court only; however, the Alabama agency urges that failure to issue protective orders affirmatively guarding the confidential nature of the list of names and addresses of these persons violates the spirit and letter of the confidentiality provisions of the Social Security Act and corresponding Alabama statutes and regulations. The Alabama agency has no knowledge nor does it appear anywhere in this lawsuit that any of the persons involved in this class action other than the Plaintiff has by any act or failure to act given permission for the possible exposure of their names. It is hard to conceive of a more sensitive type of case or one in which confidentiality would be more essential. If class actions are to be permitted in public welfare cases, it would appear appro-

priate for this Court to honor the intent of the Social Security Act and state statutes by requiring lower Courts to cooperate in protecting the rights of these helpless individuals caught up in class actions without any knowledge that their names will be turned over to the Court without protective orders.

CONCLUSION.

For the reasons above stated, it is respectfully submitted that the Order and Decree of the District Court for the Middle District of Alabama, Northern Division, in this case should be reversed.

Respectfully submitted,

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MacDONALD GALLION,
Attorney General,

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MRS. MARY LEE STAPP,
Assistant Attorney General,

.....

MRS. CAROL F. MILLER,
Assistant Attorney General,
Room 578, Administrative Building,
64 North Union Street,
Montgomery, Alabama 36104,
Attorneys for Appellants.